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No. 01-1368

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ALABAMA, ALASKA, DELAWARE, HAWAII, INDIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The States joining this brief as *amici curiae* (hereinafter "the *amici* States") respectfully submit this brief pursuant to Sup. Ct. R. 37.4. The *amici* States submit this brief in support of Petitioners Nevada Department of Human Resources, et al., urging reversal of the judgment of the Court of Appeals for the Ninth Circuit.

INTEREST OF *AMICI CURIAE*

State governments employ more than 4.8 million full- and part-time workers.[1] As some of the nation's largest employers, the States have a significant practical interest in federal employment laws and policies, particularly those that may expose state governments to liability for civil damages. As guardians of their citizens' public fisc, the States also have an interest in ensuring that any abrogation of their Eleventh Amendment immunity comports with the constitutional framework for such action. Because the decision of the Court of Appeals in this case departed from this Court's now well-established precedent for determining when Congress may properly abrogate the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, the *amici* States have an interest in seeing the Ninth Circuit's error promptly corrected.

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[1] *See* Governments Div., U.S. Census Bureau, *Government Employment March 2000* 1 (2002), http://www.census.gov/govs/apes/00emppub.pdf. As its title suggests, figures cited from *Government Employment March 2000* are based on data collected for the month of March 2000.

SUMMARY OF ARGUMENT

As early as the 1940s, many States created "family leave" programs for state employees by allowing them to use their sick leave to care for ill family members. By the time Congress enacted the Family and Medical Leave Act of 1993 (FMLA), 48 States had created such programs. Federal employees, in contrast, had no such program until the Federal Employee Family Friendly Leave Act of 1994. Prior to the FMLA, many States also offered their employees other family-friendly leave programs, such as discretionary leave without pay, and programs allowing employees to donate leave to other employees facing catastrophic or crisis situations. By 1993, approximately 34 States had also adopted state statutes addressing various family and medical leave issues, many of them patterned after earlier versions of the FMLA.

When Congress adopted the FMLA, it was not attempting to remedy a pattern of unconstitutional state conduct. Congress identified no such pattern of conduct. In fact, Congress specifically documented and highlighted the fact that most States were ahead of the Federal Government in addressing the family and medical leave needs of their employees. Congress cited the Equal Protection Clause of the Fourteenth Amendment as a justification for its own approach to leave issues, but it never accused the States of violating their obligations under the Constitution.

In holding that Congress had validly abrogated the States' sovereign immunity in adopting the FMLA, the Ninth Circuit failed to examine fully the States' family-friendly policies for state employees. Its burden-shifting framework for analyzing abrogation under Section 5 of the Fourteenth Amendment for statutes purportedly enacted to remedy sex discrimination was also erroneous. That framework is not only inconsistent with the analysis

employed by this Court in *Kimel* v. *Florida Board of Regents* and *Board of Trustees of University of Alabama* v. *Garrett*, which involved statutes enacted to address age and disability discrimination. It is also inconsistent with this Court's decision in *United States* v. *Morrison*, which involved a statute passed to address sex discrimination, and this Court's decisions upholding the Voting Rights Act of 1965, which was passed to address racial discrimination in voting. Due to these errors, the judgment of the Court of Appeals must be reversed.

ARGUMENT

Congress adopted the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601–2654 (2000), to create a national labor standard providing up to 12 weeks of unpaid leave to persons working for private or public employers with 50 or more employees. FMLA leave is available when necessary due to childbirth or to care for newborn infants, for placement of a child with the employee for adoption or foster care, to care for family members with a serious health condition, and to attend to an employee's own serious health condition. 29 U.S.C. § 2612(a)(1). Many of the *amici* States have offered their state employees personal sick leave and leave to care for ailing family members since the 1940s, and thus endorse the motives behind the FMLA and the family-friendly policies it has inspired. *Amici* fully recognize that the FMLA applies to state governments and do not challenge the statute's validity as Commerce Clause legislation. Indeed, the *amici* States charge their agencies and employees with following the FMLA both in letter and spirit.

In this case, however, the Court of Appeals for the Ninth Circuit erroneously held that the "family leave" provision of the FMLA, 29 U.S.C. § 2612(a)(1)(C), validly abrogates the States' sovereign immunity from suit. Pet. App. at 18a, 20a, 42a. The *amici* States are duty-bound to protect their citizens' public fisc from awards of monetary damages that would drain scarce state financial resources when such awards are not authorized by the Constitution. What the *amici* States seek, however, is merely to preserve their sovereign *immunity*, not to foster any form of *impunity* to disregard the legal obligations imposed by the FMLA.

The *amici* States endorse the Petitioners' cogent arguments in support of reversing the judgment of the Court of Appeals, and would draw this Court's attention

to three points. First, the States led the Federal Government in addressing family and medical leave issues; second, Congress failed to identify a pattern of unconstitutional state conduct in adopting the FMLA and was not attempting to remedy such conduct with the Act; and third, the Court of Appeals used a faulty burden-shifting framework to analyze abrogation under Section 5 of the Fourteenth Amendment. For these reasons, the judgment of the Court of Appeals must be reversed.

I. THE STATES LED THE FEDERAL GOVERNMENT IN ADDRESSING FAMILY AND MEDICAL LEAVE ISSUES.

Major federal legislation to address family and medical leave issues was first introduced in Congress as the Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985). This was hardly the first government effort to address the family and medical leave needs of state employees, however. Many States allowed their employees to utilize sick leave to care for ill family members as long ago as World War II.

A. Many States Permitted Their Employees to Use Sick Leave as Family Leave as Early as the 1940s, and 48 States Did So By the Time the FMLA Was Passed in 1993.

In *Nelson* v. *Dean*, 27 Cal. 2d 873, 168 P.2d 16 (1946), the Supreme Court of California ordered the state finance director and controller to pay a state employee for sick leave he took to care for his critically ill wife. The court upheld a State Personnel Board regulation defining sick leave for state employees

> to mean the absence from duty of an officer or employee because of his . . . attendance upon a member of his immediate family seriously ill and re-

> quiring the care or attendance of such officer or employee . . . .

Id. at 874, 168 P.2d at 17 (emphasis and internal quotation marks removed) (quoting Cal. Admin. Code. tit. 2, div. 1, ch. 1, art. 14, r. 191 (1945)); *see also Hatch* v. *Ward*, 27 Cal. 2d 883, 168 P.2d 22 (1946) (decided same day as *Nelson* v. *Dean*, ordering payment for 90 days' sick leave taken by state employee to care for her seriously ill mother). In upholding the California regulation, the court relied on the civil service rules of 16 States, all of which defined "sick leave" for state employees to "include leave to attend a sick member of the employe's immediate family." *Nelson* v. *Dean*, 27 Cal. 2d at 879–80, 168 P.2d at 20.

The court cited World War II–era regulations from Alabama, Connecticut, Florida, Idaho, Illinois, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, Wisconsin, and Wyoming as support for its holding. *Id.* at 880 n.5, 168 P.2d at 20 n.5.[2] Other States with statutes from that era

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[2] The regulations (and authorizing statutes) cited by the court from those 16 states were:

Ala. Gen. Acts, 1939, No. 58, §§ 6, 9, subd. (b); Rules of State Personnel Board, rev. Oct., 1943, Rule XI, § 2, subd. (b).

Conn. Merit System Act, §§ 648e, 680e; State Civil Service Rule II, am. June 26, 1942.

Fla. Merit System Regulations, art. XIV; Fla. Industrial Commission Regulation No. 43, effective July 1, 1945.

Idaho Code, Ann., 1932, § 49-206; Merit System Council Regulation II, § 4.

Ill. Smith-Hurd Ann. Stats., ch. 24 1/2, § 42; Merit System Council Rules, art. XIV; Public Aid Commission, Bulletin 67, June 21, 1944, Rule I-B- 1.

Ky. Rev. Stats, §§ 42.110-42.150; Personnel Rules and Regulations, Rule XI, § 3.

La. Stats., 1940, Act. 172; Department of State Civil Service Rule XI, § 4.

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No. Car. Gen. Stats., 1943, § 126-2; Merit System Rule, May, 1941, art. XIV; Regulation on Attendance and Leave for County Welfare Departments, § 4.

So. Car. Civ. Code, 1942, § 4996-2; Rule for Merit System of Personnel Administration, rev. July 1, 1945, art. XIV; Administrative Regulations on Attendance and Leave, § 2, par. 2(a).

Tenn. Civ. Service Act, Pub. Acts, 1939, ch. 221, §§ 6, 28; Rules and Regulations for Administering the Civil Service Act, Department of Personnel Bulletin 3, 1940, § 15.5.

Wisc. Civil Service Law, § 16.275 Civil Service Rule XV, § 5.

Wyo. Laws, 1937, ch. 88, §§ 3, 5; 1940 Wyo. Supp., §§ 103-1603, 103- 1605; State Department of Public Welfare Rules, art. XIV.

Nelson v. *Dean*, 27 Cal. 2d at 880 n.5, 168 P.2d at 20 n.5. Of these 16 States, only Louisiana no longer allows state employees to use sick leave as family leave. See La. Civil Serv. Rule 11.13, http://www.dscs.state.la.us/progasst/csrules/chapter11/CHAP11B.HTM; La. Atty. Gen. Op. No. 00-190, 2000 WL 1005620, at *1 (June 1, 2000).

defining sick leave for state employees to allow leave to care for members of an employee's immediate family include New Jersey and Ohio. *See* Act of July 18, 1939, ch. 232, § 5, 1939 N.J. Laws 629, 631; Act of June 17, 1947, No. 124, 1947 Ohio Laws 368. Thus, more than a third of the States allowed their employees to use sick leave as "family leave" before 1950.

In some ways, these pre-FMLA state laws and regulations authorizing family leave for state employees were

more generous than the FMLA. Perhaps most significantly, the regulations created family leave by expanding the availability of employees' sick leave, which is nearly always *paid* leave. As Respondent Hibbs emphasizes, FMLA leave is *unpaid*, although paid leave may be substituted in some situations. *See* Hibbs Br. in Opp. at 2; 29 U.S.C. § 2612(c), (d). In addition, the definition of "family" under these regulations could be broader than the relationships covered by the family leave provision of the FMLA. *See* 29 U.S.C. § 2612(a)(1)(C) (limiting family leave to "the spouse, or a son, daughter, or parent, of the employee"). For example, in 1981, the State of Alabama Personnel Department readopted its regulation defining "sick leave" for state employees to include "attendance upon members of the immediate family whose illness requires the care of such employee." Ala. Admin. Code r. 670-X-14-.01(b)(3) (filed Sept. 29, 1981, amended 1985, 1995, 2001) (excerpts are from the 1981 version). It defined "immediate family" for purposes of sick leave "to include wife or husband, children, parents *or grandparents, sister or brother, mother-in-law and father-in-law*." Ala. Admin. Code r. 670-X-14-01(b) (emphasis added to show relationships not covered by FMLA). In addition, the 1981 regulation went even further, providing that "[w]here unusually strong personal ties exist, due to an employee's having been supported or educated by a person of some relationship other than those listed, this relationship may be recognized for leave purposes," following the filing of a written statement of the circumstances. *Id.*

State policies allowing state employees to use sick leave to care for ill family members became increasingly common over the years. By 1991, "the Office of Personnel Management (OPM) found that 46 state governments . . . allow[ed] use of sick leave for family illnesses." H.R. Rep. 103-722, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3289,

3290 (citing *Reinventing Human Resource Management, Accompanying Report of the National Performance Review* (Sept. 1993)); *see Reinventing Human Resource Management*, at 52–53 & 54 n.26 (quoting U.S. Office of Personnel Management, *Options for Leave Reform* 5 (Sept. 1991)); *see also* Workplace Economics, Inc., *1991 State Employee Benefits Survey: Benefits in Effect January 1, 1991*, 10.

By the time Congress passed the FMLA in 1993, 48 States had already created their own "family leave" plans for state employees by making sick leave available to care for ill family members. *See* Workplace Economics, Inc., *1993 State Employee Benefits Survey: Benefits in Effect January 1, 1993*, 19. In contrast, Congress did not authorize federal employees to use sick leave to care for family members until *after* the FMLA. *See* Federal Employees Family Friendly Leave Act, Pub. L. 103-388, 108 Stat. 4079 (1994) (adding 5 U.S.C. § 6307(d) (2000)). In doing so, Congress expressly relied on the States' experience with such family leave policies. *See* H.R. Rep. 103-722, at 2, *reprinted in* 1994 U.S.C.C.A.N. at 3290. In the appendix to this brief, the *amici* States have compiled a list of current state laws and policies permitting state employees to use sick leave to care for ill family members.

B. Many States Also Adopted Their Own Family and Medical Leave Statutes Prior to Enactment of the FMLA in 1993.

State responses to family and medical leave issues went beyond these modifications to sick leave policies, however. Half of the States also created programs that allowed employees to donate leave to other state employees. *1993 State Employee Benefits Survey*, at 19; *see, e.g.*, Ala. Admin. Code r. 670-X-14-.04 (Supp. Sept. 30, 2001) (creating "Sick Leave Bank"); Alaska Admin. Code tit. 2, § 08.070(b) (West, WESTLAW through July 2002); Kan.

Admin. Regs. 1-9-23 (West, WESTLAW through Jan. 1, 2001). Many States also had general provisions for leave without pay that could apply after paid family leave had been exhausted. *See, e.g.*, Ala. Admin. Code r. 670-X-15-.03 (Supp. Mar. 31, 1991); Iowa Admin. Code r. 581-14.5(19A) (West, WESTLAW through July 24, 2002). Forty-two States offered some form of day care assistance to employees, most commonly pre-tax dependent care accounts. *1993 State Employee Benefits Survey*, at 42. Twelve States offered assistance with caring for elderly parents, again most commonly pre-tax dependent care accounts. *Id.* Many States also began to address family and medical leave issues through more comprehensive statutes.

The earliest of these statutes focused on leave due to pregnancy or to care for a newborn or newly adopted child. In 1980, for example, California adopted a statute requiring employers to grant up to four months' pregnancy disability leave. *See* Cal. Gov't Code Ann. § 12945 (West Supp. 2002). The following year, California enacted a law giving female permanent state employees up to a year of unpaid leave for pregnancy or childbirth, and male spouses who were permanent state employees up to a year of unpaid leave to care for a newborn child. *See* Cal. Gov't Code Ann. § 19991.6 (West 1995).

In 1983, Illinois adopted a "family responsibility leave plan" for its state employees. *See* 20 Ill. Comp. Stat. Ann. 415/8c(5) (West 2001). In addition to the availability of sick leave for use as family leave, the statute provided up to a year's unpaid leave of absence for state employees "to meet a bona fide family responsibility." *Id.*; *see also* Ill. Admin. Code tit. 80, § 420.610(a)(2) (West, WESTLAW through June 28, 2002) (sick leave available for family leave). Such a "bona fide family responsibility" included

> leave incident to the birth of the employee's child and the responsibility thereafter to provide proper care to that child or to a newborn child adopted by the employee, the responsibility to provide regular care to a disabled, incapacitated or bedridden resident of the employee's household or member of the employee's family, and the responsibility to furnish special guidance, care and supervision to a resident of the employee's household or member of the employee's family in need thereof under circumstances temporarily inconsistent with uninterrupted employment in State service.

20 Ill. Comp. Stat. Ann. 415/8c(5).

As Congress began considering family and medical leave issues in the mid-1980s, States continued to adopt their own family and medical leave laws without waiting for federal action. Some of these statutes were essentially modified versions of the FMLA legislation pending in Congress. Other statutes targeted one or another of the leave issues later addressed in the FMLA.

When the Parental and Disability Leave Act of 1985 was introduced in Congress, it received a hearing in the House of Representatives, but died in committee in the first session of the 99th Congress. *See* H.R. Rep. 103-8(I), at 18 (1993); *see also* Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 39, 58 (1994) (reprinting Women's Legal Defense Fund, *Legislative Development of the Family and Medical Leave Act* (1993)) (hereinafter *Legislative Development*). The bill was reintroduced in 1986, with minor changes, as The Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. (1986). A companion bill with the same title was also introduced in the Senate. S. 2278, 99th Cong., §§ 103, 104 (1986). The House bill received

hearings in the House of Representatives and was approved for consideration by the full House, but the 99th Congress adjourned before taking action on it. *See* H.R. Rep. 103-8(I), at 18–19; *Legislative Development*, at 59.

In 1987, family and medical leave legislation was again introduced in Congress as the Parental and Temporary Medical Leave Act of 1987, S. 249, 100th Cong. (1987), and the Family and Medical Leave Act of 1987, H.R. 925, 100th Cong. (1987). These bills received extensive congressional hearings. S. 249 was the subject of hearings before the Senate Subcommittee on Children, Families, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources in Washington, Boston, Los Angeles, Chicago, and Atlanta. *See* H.R. Rep. 103-8(I), at 19; *Legislative Development*, at 60–62. The House Committee on Education and Labor reported out a substitute for H.R. 925, but no action was taken on the floor of the House. *See id.* at 62. A Senate substitute, the Parental and Medical Leave Act of 1988, S. 2488, 100th Cong. (1988), was reported out of the Senate Committee on Labor and Human Resources, but died on the Senate floor in a filibuster. *See id.*

Meanwhile, several States decided to adopt their own family and medical leave statutes. Connecticut adopted a family and medical leave statute for state employees in 1987. *See* Conn. Gen. Stat. §§ 5-248a to 5-248b (2001). Maine and Wisconsin also adopted family and medical leave acts in 1987, but their statutes were applicable to state and private employees. *See* Me. Rev. Stat. Ann. tit. 26, §§ 843–848 (West 1988 & Supp. 2001); Wis. Code Ann. § 103.10 (West 1997 & Supp. 2002). In addition, Minnesota adopted a statute allowing state and private employees up to six weeks of unpaid leave due to the birth or adoption of a child, *see* Minn. Stat. § 181.941(1) (2000), and Colorado required employers who permitted paternity or maternity leave to make such time available to

adoptive parents, *see* Col. Rev. Stat. § 19-5-211(1.5) (2001).

Federal legislation was again introduced in 1989. Family and Medical Leave Act of 1989, S. 345, 101st Cong. (1989); H.R. 770, 101st. Cong. (1989). The House and Senate both passed H.R. 770 as amended by the Gordon-Weldon substitute in 1990. H.R. Rep. 103-8(I), at 20. The President vetoed the bill, however, and Congress failed to override the veto. *See id.*; *Legislative Development*, at 62–63.

During this two-year period, Connecticut, Minnesota, New Jersey, North Dakota, Oklahoma, and Rhode Island adopted additional state family and medical leave legislation. *See* Conn. Gen. Stat. Ann. §§ 31-51kk to 31-51qq (West 1997) (applicable to private employees) (prior version codified at Conn. Gen. Stat. §§ 31-51cc to 31-51gg); Minn. Stat. § 181.9413 (2001) (allowing public and private employees to use sick leave due to illness of or injury to employee's child); N.J. Stat. Ann. §§ 34:11B-1 to 34:11B-16 (West 2000); N.D. Cent. Code §§ 54-52.4-01 to 54-52.4-10 (2001); Okla. Stat. Ann. § 840-2.22 (West 2002) (renumbered from Okla. Stat. Ann. tit. 74, § 840.7c in 1994, prior version set out as not under tit. 74, § 840-2.22); R.I. Gen. Laws §§ 28-48-1 to 28-48-9 (Lexis 2000); *see also* Haw. Admin. R. § 12-46-108(a) (West, WESTLAW through July 2002) (requiring leave for reasonable period of time due to pregnancy, childbirth, and related conditions).

Federal legislation identical to that vetoed in 1990 was again introduced in Congress in 1991. Family and Medical Leave Act of 1991, H.R. 2, 102d Cong. (1991); *see also* S. 5, 102d Cong. (1991). The House and Senate passed amended versions of their respective bills, which were then reconciled in conference. H.R. Rep. 103-8(I), at 20–21. Congress passed the Conference Report in 1992.

This bill was vetoed in 1992, and Congress again failed to override. *See Id.* at 21; *Legislative Development*, at 65–66.

Meanwhile, Alaska, California, Florida, Georgia, and Hawaii adopted various forms of family and medical leave legislation. *See* Alaska Stat. §§ 23.10.500–23.10.550 (Lexis 2000); Alaska Stat. § 39.20.305 (Lexis 2000); Cal. Gov't Code Ann. § 12945.2 (West Supp. 2002); Fla. Stat. § 110.221 (2001); Ga. Code. §§ 45-24-1 to 45-24-9 (Supp. 1995) (repealed 1995); Haw. Rev. Stat. §§ 398-1 to 398-29 (1993 & Supp. 2001).

Finally, in January 1993, the bill that would become the FMLA was introduced in the 103rd Congress. Family and Medical Leave Act of 1993, S. 5, 103d Cong. (1993); *see also* H.R. 1, 103d Cong. (1993). The House amended its bill to conform to the Senate version, H.R. Rep. 103-8(I) at 17, and Congress passed the FMLA on February 4, 1993, *id.* at 1. President Clinton signed the FMLA into law the following day. Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6, 29. The substantive provisions of the FMLA took effect six months later. *See id.*, § 405(b)(1), 107 Stat. at 26.

As noted above in § I(A), by this time, 48 States had policies authorizing the use of sick leave to care for ill family members. H.R. Rep. 103-722, at 2, *reprinted in* 1994 U.S.C.C.A.N. at 3290. According to the Commission on Family and Medical Leave, approximately 34 States also had adopted statutes authorizing varying forms of family and medical leave for public or private employees. Comm'n on Fam. & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 45 (1996), http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/chap3.pdf.[3]

[3] *See also* n.8 below and accompanying text.

II. CONGRESS WAS NOT REMEDYING UNCONSTITUTIONAL STATE CONDUCT WITH THE FMLA.

This Court has held that for Congress to invoke its enforcement authority under Section 5, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). The congressional findings that support the FMLA, 29 U.S.C. § 2601(a), include no mention of state conduct or policies that Congress believed were in violation of the Fourteenth Amendment; indeed, state governments are not mentioned in Congress's findings at all. *See id.* As the Fourth Circuit has observed, "Congress did not identify . . . *any* pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." *Lizzi* v. *Alexander*, 255 F.3d 128, 135 (4th Cir. 2001) (emphasis added), *cert. denied*, 122 S. Ct. 812 (2002). In the light of the States' leadership in addressing the family and medical leave needs of their employees, this is not surprising.

A. Congress Did Not Identify a Pattern of Unconstitutional State Conduct in Enacting the FMLA.

The Ninth Circuit held that Congress had identified a pattern of unconstitutional state conduct by pointing to two documents among the "snippets from legislative hearings concerning earlier versions of the FMLA,"[4] submitted by the United States. The first document was

[4] *Sims* v. *Univ. of Cincinnati*, 219 F.3d 559, 563 (6th Cir. 2000).

a 1990 Bureau of Labor Statistics ("BLS") survey cited in the Senate Report on the FMLA, which "found that 37 percent of surveyed private-sector employees were covered by 'maternity' leave policies, while only 18 percent were covered by 'paternity' leave policies." Pet. App. at 20a (citing S. Rep. No. 103-3, at 14–15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 17). The second document was the transcript of a congressional committee hearing held in 1986 in which a witness testified that a "survey of the private and public sectors done by the Yale Bush Center Infant Care Leave Project revealed that '[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'" Pet. App. at 20a–21a (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor*, 99th Cong. 33 (1986) (prepared statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project), and citing *id.* at 29–30 (testimony of Meryl Frank)). The Court of Appeals concluded that, when "[t]aken together, the BLS and Yale Bush Center surveys constitute substantial evidence of *unconstitutional* state-sponsored gender discrimination in leave policies for state employees." Pet. App. at 21a (emphasis added).

This conclusion is flawed for several reasons. First, the Court of Appeals assumed that any disparity in the availability of maternity and paternity leave in the public sector was the result of *unconstitutionally* disparate leave policies for men and women. *See id.* The disparity between the availability of maternity and paternity leave, however, was more likely the result of policies meant to account for "actual physical disability on account of pregnancy, childbirth, or related medical conditions," which this Court upheld under Title VII in *California*

Federal Savings & Loan Ass'n v. *Guerra*, 479 U.S. 272, 290 (1987) (emphasis removed).[5] In *Guerra*, this Court reasoned that the Pregnancy Discrimination Act[6] amendments to Title VII were "not intended to prohibit all employment practices that favor pregnant women," *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 218 n.6 (1991) (White, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in part and concurring in judgment) (citing *Guerra*, 479 U.S. at 284–90), especially where the practice was tied not to stereotypical notions but instead to actual physical disability due to pregnancy or childbirth. *Guerra*, 479 U.S. at 290; *see also Geduldig* v. *Aiello*, 417 U.S. 484, 494–95 (1974) (holding that state disability insurance program that excluded from coverage disability due to normal pregnancy did not violate Equal Protection Clause). The disparity in leave availability could also have been the result of gender-neutral policies that varied from State to State or agency to agency.

Second, the Court of Appeals attributed the disparity to state governments, Pet. App. at 21a ("widespread *intentional* gender discrimination by states"), even though the 1986 testimony related to the entire "public sector." Local governments employ more than twice as many workers as state governments. *See Government Employment March 2000* at 1. Lumping States, which enjoy Eleventh Amendment immunity, together with counties and municipalities, which do not have such immunity, is

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[5] *See, e.g.*, Cal. Gov't Code Ann. § 12945(b)(2) (upheld in *Guerra*, requiring four months leave for female employees disabled because of pregnancy or childbirth); Alaska Stat. § 23.10.500(a) (providing same benefits to employee whose health is affected by pregnancy, childbirth, or related condition as granted to other employees with similar ability to work); Conn. Gen. Stat. § 46a-60(a)(7) (2001) (requiring reasonable leave of absence for disability resulting from pregnancy).

[6] Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

inappropriate. *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368–69 (2001). Next, the court concluded—without support from the legislative record—that Congress could infer that this information regarding maternity and paternity leave translated into similar gender-based disparities regarding family leave. Pet. App. at 21a. There is no evidence, however, that state policies allowing sick leave to be used as family leave discriminated on the basis of gender. Finally, by relying on it, the court apparently concluded that the information presented to the 99th Congress in 1986 regarding the similarities between patterns of leave availability in the public and private sectors was still valid seven years (and four Congresses) later when the FMLA was passed by the 103rd Congress in 1993.

It is doubtful that such an extended chain of questionable inferences could ever support a conclusion that there was some (unstated) congressional finding that state policies on family leave were unconstitutional. The chain crumbles, however, when confronted with the States' actual record in addressing family and medical leave issues and the FMLA's legislative history regarding state family and medical leave policies.

B. Congress Acknowledged the States' Leadership in Addressing Family and Medical Leave Issues.

Far from criticizing the States regarding their treatment of family leave issues, Congress expressly recognized that most States had already responded to their employees' leave needs by enacting some form of family or medical leave. In both the House and Senate Reports accompanying the FMLA, Congress included sections detailing progressive State laws on family leave issues:

FAMILY LEAVE LAWS IN THE STATES

Since Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives. Approximately 30 States, the District of Columbia and Puerto Rico have adopted some form of family or medical leave.

California provides up to 16 weeks of leave over 2 years for the birth or adoption of a child, or for the serious health condition of a child, spouse, or parent. It applies to employers with 50 or more workers. California law also requires employers of five or more employees to provide women with a reasonable pregnancy disability leave of up to 4 months. Vermont provides 12 weeks of family and medical leave per year. Employers of 10 or more workers must provide leave to care for a newborn or newly adopted child; employers of 15 or more must also provide leave to care for the serious health condition of a worker's child, spouse, or parent, or for the worker's own serious health condition. The District of Columbia's law provides 16 weeks every 2 years for family leave, and a separate 16 weeks every 2 years for medical leave. Rhode Island's law provides 13 weeks of unpaid family and medical leave for birth, adoption or the serious illness of a family member and the worker's serious health condition. The Rhode Island law covers workers employed by firms of 50 or more. The Wisconsin law requires employers of 50 or more workers and the State government to grant up to 6 weeks of unpaid leave for the birth or adoption of a child, 2 weeks to care for a child, spouse or parent with a serious health condition, and 2 weeks of personal medical leave within a 12 month period. Oregon has enacted a law which

provides for 12 weeks of unpaid parental leave per child for childbirth or adoption for all workers employed by companies with 25 or more employees. Oregon has also enacted a family leave law that provides 12 weeks of leave every 2 years to care for a seriously ill parent or spouse or to care for a sick child for workers employed by companies of 50 or more. The law in Maine requires private employers and local governments having 25 or more employees and the State government to grant up to 8 weeks (over a 2 year period) of unpaid leave for birth, adoption, care of a family member with a serious illness or the employee's own serious illness. North Dakota's law covers State employees and provides 16 weeks of family leave per year for birth, adoption, illness of a spouse, child, or parent. Pennsylvania's law covers State employees and provides 6 months (24 weeks) of parental leave for the birth or adoption of a child. Puerto Rico guarantees 8 weeks paid pregnancy leave at half salary, which can be extended an additional 12 weeks in the event of complications. Puerto Rico's law applies to all employers, and all employees are eligible for coverage. Minnesota has a 6 week parental leave law for birth or adoption covering workers at firms with 21 or more employees.

These States join many others that have enacted laws or regulations protecting employees' right to some form of family or medical leave including Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.

S. Rep. 103-3, at 20–21, *reprinted in* 1993 U.S.C.C.A.N. at 22–23; *see also* H.R. Rep. 103-8(I), at 32–33 (similar language).

Many of the laws described in the Senate and House Reports provided greater benefits in some way than the FMLA—e.g., by providing longer leave periods (Pennsylvania), applying to private employers with fewer employees (Maine), or making paid leave available (Puerto Rico). This recitation of facts is more a ringing congressional endorsement of State conduct than an attempt to show a pattern of unconstitutional State behavior that required remedial action under Section 5 of the Fourteenth Amendment.

Moreover, Congress's list of States with "laws or regulations protecting employees' right to some form of family or medical leave" did not purport to be exhaustive, and the "Commission on Family and Medical Leave," which Congress created to study employee leave issues,[7] later found that the States' leave policies in 1993 were actually even a bit better than Congress had realized. According to the Commission, a total of 34 States plus the District of Columbia and Puerto Rico had adopted some form of family or medical leave by early 1993. *A Workable Balance*, at 45. Of the 34 States with family or medical leave laws or regulations in 1993, all 34 covered State employees, while 23 "had leave laws covering both private and state employees." *Id.* at 46.

For this conclusion, the Commission relied in part on a Department of Labor Women's Bureau publication cataloguing the States' family and medical leave laws as of early 1993, which the Commission characterized as one of the sources of "[t]he most complete information on state

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[7] *See* 29 U.S.C. §§ 2631–2633.

laws" regarding family and medical leave prior to the FMLA. *Id.* at 45–46 & nn.33, 34. The Women's Bureau publication suggested, moreover, that even the figure of 34 States was understated, because the Women's Bureau study was only "based on State *statutes*." Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* 1 n.1 (1993) (emphasis added). The study noted that "[s]ome States may provide comparable leave to State and other public employees through personnel codes, policy, practice, executive order, or management directive." *Id.* [8]

The following year, Congress acknowledged that almost all States were, in fact, providing "comparable leave" to state employees by making sick leave available for use as family leave. As noted above, in 1994 Congress adopted the Federal Employees Family Friendly Leave Act; its House committee report noted that "the Office of Personnel Management (OPM) found that 46 state governments . . . allow[ed] use of sick leave for family illnesses." H.R. Rep. 103-722, at 2, *reprinted in* 1994 U.S.C.C.A.N. at 3290. The OPM report containing this figure was released in 1991; by 1993, the number of States had grown to 48. *See 1993 State Employee Benefits Survey*, at 19.

C. Congress Cited the Equal Protection Clause as Justification for Its Own Approach to Leave Issues, Not as the Basis for Remedial Legislation.

As Respondents have noted, Congress did refer to the Equal Protection Clause of the Fourteenth Amendment in the FMLA. 29 U.S.C. § 2601(b)(4), (5). Respondents

[8] The Women's Bureau figure was also understated due to the omission of an Arkansas statute making sick leave available as family leave for state employees. See Ark. Code § 21-4-206(b) (1996).

misinterpret the meaning of this reference, however. Congress's reference to equal protection is not found in the statement of congressional "Findings," but in the statement of congressional "Purposes." Congress set forth those purposes in 29 U.S.C. § 2601(b):

> It is the purpose of this Act—
>
> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
>
> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
>
> . . . .
>
> (4) *to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis*; and
>
> (5) *to promote the goal of equal employment opportunity for women and men, pursuant to such clause.*

29 U.S.C. § 2601(b) (emphasis added).

There is no hint of a congressional conclusion that the States had engaged in conduct that violated the Fourteenth Amendment. Instead, the reference to equal protection in § 2601(b)(4) is better understood as Con-

gress making clear that it intended its *own* approach to family and medical leave to comply with the principle of equal protection and equal employment opportunity. In other words, Congress was clarifying that it had designed the FMLA to avoid the risk of *causing* equal protection violations. Congress did not suggest, however, that the States (or local governments, for that matter) had failed to uphold their constitutional obligations in addressing family or medical leave issues in the past. "At best, Congress sought to 'minimize[ ] the *potential* for employment discrimination on the basis of sex.'" *Sims*, 219 F.3d at 564–65 (quoting *Florida Prepaid*, 527 U.S. at 641). Thus, the references to the Equal Protection Clause in the FMLA do not support a conclusion that the Act was adopted as remedial enforcement legislation under Section 5 of the Fourteenth Amendment.

The Senate and House reports confirm that Congress did not view the FMLA as remedying unconstitutional state conduct. In those reports, Congress expressed concern about enacting a leave provision for only one sex or group of employees. Thus, Congress drafted the FMLA so that it would

> address[ ] the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.
>
> A law providing special protection to women or any defined group, in addition to being inequitable, *runs the risk of causing discriminatory treatment*. S. 5, by addressing the needs of all workers, avoids such a risk.
>
> Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

S. Rep. 103-3, at 16 (emphasis added), *reprinted in* 1993 U.S.C.C.A.N. at 18; *see also* H.R. Rep. 103-8(I), at 29 (similar language).

Thus, Congress was working to uphold its *own* obligation to avoid the "risk of causing discriminatory treatment" in violation of equal protection or due process, while exercising its Commerce Clause powers to address leave issues and impose leave obligations on state actors. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; *Vance* v. *Bradley*, 440 U.S. 93, 94 n.1 (1979) ("[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."). Congress never accused the States of violating their obligations under the Fourteenth Amendment, however. As the Sixth Circuit observed regarding the 1993 House Reports in *Sims*, "[t]hese passages seek to justify the FMLA's provision of leave to all covered employees on the basis of the potential for gender-related discrimination. They do not suggest, however, that Congress was responding to a pattern of actual discrimination on the part of the States." 219 F.3d at 564.

III. THE COURT OF APPEALS EMPLOYED AN ERRONEOUS BURDEN-SHIFTING ANALYSIS FOR SECTION 5 ENFORCEMENT LEGISLATION.

Under this Court's precedents, "[t]he first step" in analyzing Congress's exercise of authority under Section 5 of the Fourteenth Amendment "is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Next, having "determined the metes and bounds of the constitutional right in question,"

the Court "examine[s] whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States . . . ." *Id.* at 368; *Kimel*, 528 U.S. at 89. Finally, the Court determines whether the remedy or remedies chosen by Congress are congruent and proportional to the constitutional injury it identified. *Garrett*, 531 U.S. at 372; *see City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

The Ninth Circuit reasoned that the heightened scrutiny applicable to sex discrimination claims[9] distinguished this case from *Kimel* and *Garrett*, which involved classifications based on age and disability subject to rational-basis scrutiny. Pet. App. at 14a, 17a. When a gender-based classification is challenged, the burden of satisfying the standard of intermediate scrutiny rests with the State. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). With rational-basis scrutiny, the burden rests on the party challenging the classification "to negative '"any reasonably conceivable state of facts that could provide a rational basis for the classification."'" *Garrett*, 531 U.S. at 367 (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993), in turn quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The Court of Appeals observed that the burden of proof placed on the State under intermediate scrutiny "has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination." Pet. App. at 14a.

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[9] See *Nguyen* v. *INS*, 533 U.S. 53 (2001); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

The Court of Appeals contrasted its "presumption of unconstitutionality" for sex-based classifications with classifications based on age and disability such as those at issue in *Kimel* and *Garrett*. "In effect," the court reasoned, in those cases "the relevant provisions of the ADA and the ADEA were subject to a *presumption of unconstitutionality*—the burden was on the defenders of the legislation to prove that it was valid under section 5." Pet. App. at 17a. The Court of Appeals stated that, "[w]hile the creation of such a presumption might appear extraordinary and incongruous, it makes sense in light of the Court's emphasis on the fact that state-sponsored age and disability discrimination is *not* subject to heightened scrutiny. The presumption of unconstitutionality applied to the ADA and the ADEA thus is merely the flip side of the presumption of constitutionality that is accorded to state-sponsored age and disability discrimination." *Id.* Pet. App. at 17a. The Court of Appeals then concluded that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct." Pet. App. at 18a (footnote omitted).

The Ninth Circuit's shifting presumptions for Section 5 analysis are inconsistent with this Court's precedent. First, the "presumption of unconstitutionality" that the Ninth Circuit claims was applied in *Kimel* and in *Garrett* does indeed "appear extraordinary and incongruous"—but principally because there is no such presumption, and this Court did not employ such a presumption in either case. Rather, as the Court stated in *United States* v. *Morrison*, congressional enactments enjoy a "presumption of constitutionality" and will be invalidated "only upon a plain showing that Congress has exceeded its constitu-

tional bounds." 529 U.S. 598, 607 (2000); *see also United States* v. *Harris*, 106 U.S. 629, 635 (1883). The opinions of this Court in both *Kimel* and *Garrett* show that Congress failed to identify a pattern of unconstitutional conduct by the States with respect to age or disability discrimination, and that Congress's remedies were disproportionate. *Garrett*, 531 U.S. at 368, 372; *Kimel*, 528 U.S. at 89, 86. Neither act was presumed unconstitutional; they were both *proven* unconstitutional.

Second, requiring "the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct" improperly allows a court to *presume* unconstitutional conduct and then forces the challenger to attempt the always difficult task of proving a negative. *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) ("[I]t is never easy to prove a negative"). The Court of Appeals justified this remarkable burden because the FMLA was intended to address sex discrimination, which receives intermediate scrutiny.

This Court analyzed Section 5 enforcement legislation addressing sex discrimination in *Morrison*, however, and imposed no such burden of proving a negative, instead looking to the legislative record to see what Congress had actually found. 529 U.S. at 626 (noting that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"). The Court similarly did not presume unconstitutional behavior in analyzing the Voting Rights Act of 1965, but instead looked to the substantial record Congress assembled of unconstitutional state-sponsored discrimination in the context of voting rights. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 310–15 (1966). When Congress later failed to assemble a record of unconstitutional state conduct in support of lowering the voting age to 18 in state and local elections in the Voting Rights Act of 1970,

this Court held that Congress had exceeded its authority under Section 5. *See Oregon* v. *Mitchell*, 400 U.S. 112, 130 (1970) (opinion of Black, J.); *id.* at 212–13 (Harlan, J., concurring in part and dissenting in part); *id.* at 293–94 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); *see also City of Boerne*, 521 U.S. at 530–31 (examining legislative record in case involving Free Exercise Clause of First Amendment).

Finally, the Court of Appeals' review of historical sex discrimination, Pet. App. at 23a–42a, raised its inquiry to a level of abstraction that rendered it ineffective as an analytical tool. It allowed the court to presume current unconstitutional behavior based on past (and in many instances, long past) behavior. It also permitted the court to cite past stereotypes generally to justify specific new requirements under Section 5 that substantively rewrite the underlying constitutional guarantee. *Cf. City of Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States"). Although history may provide a basic framework and threshold for further analysis of state conduct, history *alone* is not sufficient to demonstrate a *current* pattern of unconstitutional behavior. The Ninth Circuit's approach mistakenly directs attention away from more recent and current state conduct, leading to other errors, such as ignoring the 34 States that had already enacted family or medical leave laws for their employees by the time Congress enacted the FMLA and the 48 States that had provided their employees family leave through their sick leave policies. *See* § I, above.

The Court of Appeals' substantial departures from "the[] now familiar principles" for analyzing congressional abrogation under Section 5 led it to conclude that

the FMLA's family leave provision, 29 U.S.C. § 2612(a)(1)(C), is appropriate Section 5 enforcement legislation. Under this Court's precedents, however, the family leave provision is neither congruent nor proportional to any constitutional injury identified by Congress. Thus, it is not appropriate Section 5 legislation.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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August 22, 2002

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STATE LAWS AND POLICIES PERMITTING STATE EMPLOYEES TO USE PAID SICK LEAVE TO CARE FOR ILL FAMILY MEMBERS

Alabama

Ala. Admin. Code r. 670-X-14-.01 (Supp. Sept. 30, 2001), WL AL ADC 670-X-14-.01

Alaska

Alaska Stat. Ann. § 39.20.305(a) (Lexis 2000)

Alaska Admin. Code tit. 2, § 08.050(b) (West, WESTLAW through July 2002), WL 2 AK ADC 08.050

NOTE: Alaska has consolidated "sick leave" and "annual leave" for most State employees into "personal leave."

Arizona

Ariz. Admin. Code R2-5-404(A)(4) (West, WESTLAW through Mar. 31, 2002), WL AZ ADC R2-5-404

Arkansas

Ark. Code Ann. § 21-4-206(b) (Michie 1996)

Ark. Code R. 006 24 001, § 105.3.5(B) (West, WESTLAW through July 2002), WL AR ADC 006 24 001

California

Cal. Code Regs. tit. 2, § 599.745(d) (West, WESTLAW through Aug. 2, 2002) (represented employees), WL 2 CCR 599.745

Cal. Code Regs. tit. 2, § 599.745.1(a)(4) (West, WESTLAW through Aug. 2, 2002) (excluded employees), WL 2 CCR 599.745.1

Colorado

4 Colo. Code Regs. § 801, r. P-5-5 (West, WESTLAW through June 2002), WL 4 CO ADC 801

Delaware

Del. Code Regs. 10 450 002, r. 6.0310 (West, WESTLAW through July 2002), WL CDR 10 450 002

Florida

Fla. Stat. § 110.221 (2001)

Fla. Admin. Code Ann. r. 60K-5.030(2)(b)(3) (West, WESTLAW through June 1, 2002), WL 60 FL ADC 60k-5.030

Georgia

Ga. Comp. R. & Regs. r. 478-1-.18.303.1 (West, WESTLAW through Mar. 31, 2001), WL GA ADC 478-1-.18

Hawaii

Haw. Rev. Stat. § 79-32 (1993) (repealed eff. July 1, 2001, by 2000 Haw. Laws Act 253, § 132, but the repeal is not to affect the rights, benefits, and privileges of persons occupying civil service positions hired prior July 1, 2001, until those rights, benefits, and privileges are negotiated into collective bargaining agreements or established by executive order for civil service employees, *see* 2001 Haw. Laws Act 123, § 15)

Idaho

Idaho Admin. Code § 15.04.01.240.03 (West, WESTLAW through Apr. 3, 2002), WL IDAPA 15.04.01.240

Illinois

Ill. Admin. Code tit. 80, §420.610(a)(2) (West, WESTLAW through June 28, 2002), WL 80 IL ADC 420.610

Indiana

Ind. Admin. Code, tit. 31, r. 1-9-4(a) (West., WESTLAW through June 10, 2002), WL 31 IN ADC 1-9-4

Iowa

Iowa Admin. Code 581-14.3(19A)(11)(b) (West, WESTLAW through July 24, 2002), WL IA ADC 581-14.3(19A)

Kansas

Kan. Admin. Regs. 1-9-5(e)(1)(B) (West, WESTLAW through Jan. 1, 2001), WL KS ADC 1-9-5

Kentucky

101 Ky. Admin. Regs. 2:102(2)(2)(a)(3) (West, WESTLAW through Aug. 15, 2001) (classified service), WL 101 KAR 2:102

101 Ky. Admin. Regs. 3:015(2)(2)(a)3 (West, WESTLAW through Aug. 15, 2001) (unclassified service), WL 101 KAR 3:015

Maine

Me. Code R. 18-389, ch. 11, § 2(C)(4)(d) (West, WESTLAW through June 2002), WL 18-389 CMR Ch. 11, § 2

Maryland

Md. Code Ann., State Pers. & Pens. § 9-501(b)(2) (Michie 1997)

Massachusetts

Mass. Rules Governing Leave & Other Benefits for Managers & Confidential Employees § 4.07 (Jan. 28, 2002), http://www.state.ma.us/hrd/redbook0400.htm

Memorandum from James J. Hartnett, Jr., Personnel Administrator, to Cabinet Secretaries, Department Heads, and Agency Heads re Implementation of Enhanced Family Friendly Policies and Benefits (Apr. 28, 2000) (describing incorporation of enhanced sick leave for family care benefits to be incorporated into collective bargaining agreements), http://www.state.ma.us/hrd/training/hrdnew/employee_services/ES_Emp_Bene/ES_EB_Family_Friendly/FMLA_policy_memo.doc

Michigan

Mich. Civ. Serv. Reg. 5.10(3)(B)(4)(a) (eff. Mar. 18, 2001), http://www.michigan.gov/mdcs/1,1607,7-147-6877_9788-20165--,00.html

Minnesota

Minn. Stat. § 181.9413(a) (2000)

Mississippi

Miss. Code Ann. § 25-3-95(2) (Lexis 1999)

Miss. Code R. 46 000 001, § 7.22.3a (West, WESTLAW through July 2002), WL 46 000 CMSR 001

Missouri

Mo. Code Regs. tit. 1, § 20-5.020(2)(K) (West, WESTLAW through June 30, 2002), WL 1 MO ADC 20-5.020

Montana

Mont. Code Ann. § 2-18-601(11) (2001)

Mont. Admin. R. 2.21.122(7) (West, WESTLAW through Mar. 31, 2002), WL ARM 2.21.122

Mont. Admin. R. 2.21.132(1)(h) (West, WESTLAW through Mar. 31, 2002), WL ARM 2.21.132

Nebraska

Neb. Admin. Code tit. 273, ch. 9, § 005.01D (West, WESTLAW through Apr. 22, 2002), WL 273 NAC Ch. 9, § 005

Nevada

Nev. Admin. Code § 284.554(6) (West, WESTLAW through Apr. 19, 2002), WL NAC 284.554

New Hampshire

N.H. Code Admin R. Per. 1204.05(c) (West, WESTLAW through July 15, 2002), WL NH ADC PER 1204.05

New Jersey

N.J. Admin. Code § 4A:6-1.3(g)(3) (West, WESTLAW through Aug. 19, 2002), WL NJ ADC 4A:6-1.3

New Mexico

N.M. Admin. Code § 1.7.7.10(D) (West, WESTLAW through July 2002), WL NM ADC 1.7.7

New York

N.Y. Civil Serv. R. & Regs. § 21.3(f) (McKinney 1999), WL NY CIV SERV App § 21.3

North Carolina

N.C. Admin. Code tit. 25, § 1E.0305(4) (West, WESTLAW through July 30, 2002), WL 25 NCAC 1E.0305

North Dakota

N.D. Admin. Code § 4-07-13-07(3) (West, WESTLAW through Aug. 1, 2002), WL NDAC 4-07-13-07

Ohio

Ohio Rev. Code Ann. § 124.382(D) (Anderson 2001)

Oklahoma

Okla. Stat. Ann. tit. 74, § 840-2.22(A), (C)(1)(c), (C)(2) (West 2002)

Okla. Admin. Code § 530:10-15-12(1) (West, WESTLAW through August 15, 2000), WL OK ADC 530:10-15-12

Oregon

Ore. Rev. Stat. § 659A.174(3) (2001)

Ore. Admin. R. 839-009-0280 (West, WESTLAW through May 15, 2002), OR ADC 839-009-0280

Ore. Dep't Admin. Servs., Hum. Res. Servs. Div. State Policy 60.000.01(1)(a)(A) (Eff. Aug. 24, 2001), http://www.hr.das.state.or.us/hrsd/policy/P6000001.pdf

Pennsylvania

4 Pa. Code § 30.23(5) (West, WESTLAW through Aug. 2002), WL PA ADC § 30.23

Pa. Personnel R. 8.23(5) (Gov.'s Mgmt. Dir. 505.7, Feb. 24, 1998), http://www.hrm.state.pa.us/oahrm/LIB/oahrm/20/11/505-7.pdf

Rhode Island

R.I. Code R. 01 060 001, r. 5.0623 (West, WESTLAW through July 2002), WL RI ADC 01 060 001

South Carolina

S.C. Code § 8-11-40 (2002)

S.C. Code Ann. Regs. § 19-710.04(6) (West, WESTLAW through Mar. 22, 2002), WL SC ADC 19-710.04

South Dakota

S.D. Admin. R. 55:01:22:02.04(2) (West, WESTLAW through July 10, 2002), WL SD ADC 55:01:22:02.04

Tennessee

Tenn. Code Ann. § 8-50-802(a)(3) (Lexis Supp. 1999)

Tenn. Comp. R. & Regs. 1120-6-.12(1)(e) (West, WESTLAW through July 29, 2002), WL TN ADC 1120-6-.12

Texas

Tex. Gov't Code Ann. § 661.202(d), (e) (Vernon Supp. 2002)

Utah

Utah Admin. Code R477-8-7(4)(c) (West, WESTLAW through Apr. 1, 2002), WL UT ADC R477-8

Vermont

Vt. Stat. Ann. tit. 21, § 472(b) (Supp. 2001)

Washington

Wash. Rev. Code Ann. § 49.12.270 (West 2002); *see also* 2002 Wash. Legis. Serv. Ch. 243 (S.S.B. 6426) (West) (amending § 49.12.270 eff. Jan. 1, 2003)

Wash. Admin. Code § 356-18-060(2), (3) (West, WESTLAW through July 3, 2002), WL WA ADC § 356-18-060

West Virginia

W. Va. Code St. R. § 143-1-14.4(f)(6) (West, WESTLAW through June 2002), WL WV ADC § 143-1-14

Wisconsin

Wis. Stat. Ann. § 103.10(5)(b) (West 1997 & Supp. 2000)

Wis. Admin. Code § ER 18.03(4)(c) (West, WESTLAW through June 2002), WL ADC § ER 18.03

Wyoming

Wyo. R. & Regs. AI PSD ch. 10, § 2(b) (West, WESTLAW through May 24, 2002), WL WY ADC AI PSD Ch 10 § 2

***See also*:**

Virginia

Rather than allowing employees to use sick leave to care for ill family members, Virginia created separate paid "family and personal leave." Va. Code § 51.1-1107 to 51.1-1108 (2002). Employees are entitled to 32 to 40 hours of such "family and personal leave" per year depending upon length of service with the State.